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No. 90-1406

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROWE INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the decision of the Armed Services Board of Contract Appeals that the Air Force properly terminated its contracts with petitioner for default.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. Brown op. 1-20; Nies op. 1-9; Cowen op. 1-21)[1] is unreported but is noted at 918 F.2d 186 (Table). The decision of the Armed Services Board of Contract Appeals (Pet. App. ASBCA op. 1-42) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1990. A petition for rehearing was denied on November 27, 1990. The petition for a writ of certiorari was filed on February 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 16, 1983, the Air Force awarded petitioner a contract for $113,536 to supply the Air Force with

[1] The petition appendix separately paginates each of the three opinions by the judges on the court of appeals, as well as the decision of the Armed Services Board of Contract Appeals.

80 electrical bundles to be used in the bomb navigation system of the B-52 bomber (Pet. App. Brown op. 3; *id.* at ASBCA op. 2). The contract specified that 40 bundles were to be delivered by December 1984, and another 40 were to be delivered by January 1985. On May 7, 1984, the Air Force awarded petitioner a second contract for $100,763 to supply 71 additional electrical bundles by June 1985 (Pet. App. Brown op. 3; *id.* at ASBCA op. 2-3). Both contracts required petitioner in constructing the bundles to use the cable specified in an engineering drawing in petitioner's possession (Pet. App. Brown op. 4-5). That drawing provided for use of "Okoflex insulation or equivalent." *Ibid.*

The electrical bundles petitioner was to supply were critical to the ability of the B-52 to deliver nuclear and conventional weapons to their targets (Pet. App. Brown op. 15). For petitioner to qualify as an approved source for the bundles, its product had passed an exhaustive evaluation program that included laboratory testing, humidity testing, temperature testing, vibration testing, shrink testing, interference radiation testing, and a flight test on a B-52 aircraft (*id.* at ASBCA op. 5). After its bundles were qualified, petitioner became the sole supplier of them to the Air Force from 1975 to 1984 (*ibid.*). During that period, all of the bundles that petitioner provided under its contracts were insulated with Okoflex (*id.* at Brown op. 5).

The sole supplier of Okoflex insulation was the Okonite Company (*ibid.*). On May 16, 1984, Okonite informed petitioner that Okoflex would no longer be produced (Pet. App. Brown op. 5). Okonite also advised petitioner that a new material, Ethylene/Propylene Rubber (EPR), was available that would, according to the supplier of EPR, meet applicable requirements (*ibid.*). Substitution of the new material was an engineering change that required authorization under petitioner's contracts (Pet. App. ASBCA op. 8-14). Petitioner accordingly submitted a value engineering

change proposal (VECP), seeking formal approval of the modification (Pet. App. Brown op. 6; *id.* at ASBCA op. 8-12).

The VECP was reviewed by the aircraft electrical systems engineer at the Oklahoma City Air Logistics Center, the office responsible for approving such proposals (Pet. App. ASBCA op. 18, 23). The engineer recommended denial of the VECP on the ground that petitioner had materially altered the bundles without supplying adequate engineering data to determine whether, if modified as proposed, the bundles would function properly (*id.* at 23-29). The engineer later testified that, to approve the VECP, bundles with EPR insulation would have had to undergo the same tests as those to which bundles with Okoflex had been subjected, including laboratory tests, humidity tests, altitude tests, and an actual flight test on a B-52 aircraft (*id.* at 25, 39). This process could take several years to complete (*id.* at 23-25).

While the VECP was under review, the Air Force decided to change the electrical system in the B-52 bomb navigation radar in a way that eliminated the need for the electrical bundles (Pet. App. ASBCA op. 21-22, 26). At that time, there were sufficient bundles in the Air Force's inventory to satisfy requirements until the change was implemented (*id.* at 22). Accordingly, there was no need for bundles that would have to be subjected to a time-consuming and expensive qualification process.

Petitioner was informed on March 12, 1985 that its VECP was denied (Pet. App. ASBCA op. 29-30). Notwithstanding denial of its VECP, petitioner proceeded to complete the electrical bundles under both contracts using EPR insulation (*id.* at 33). In July 1985, the contracting officer terminated both contracts for default on the ground that petitioner had not tendered conforming goods by the due date (Pet. App. Nies op. 2-3; *id.* at ASBCA op. 33; Pet. 3). The contracting officer denied petitioner's request that, in lieu

of termination for default, the contracts be terminated for the convenience of the government (Pet. App. ASBCA op. 32-34).

2. On appeal, the Armed Services Board of Contract Appeals (ASBCA) upheld the contracting officer's decision to terminate the contracts for default (Pet. App. ASBCA op. 1-42). The ASBCA found that "when [the Air Force] ordered the specific part number for the bundles, [it] acted with the expectation that it would receive bundles which were the same as those which had been qualified" (*id.* at 36). Petitioner was improperly "attempting to change * * * both the dimensions and materials of the bundles after the qualification process was completed" and to "place the burden of evaluating and approving the change on the Air Force" (*id.* at 37, 40).

3. The Federal Circuit affirmed the ASBCA's decision. The court (Brown, J.) held that substantial evidence supported the ASBCA's finding that "the parties' conduct and the circumstances surrounding the contract created a legally enforceable expectation" that Okoflex insulation would be used (Pet. App. Brown op. 14). Chief Judge Nies concurred, stating that petitioner's tender of bundles with EPR insulation "did not conform to what was required by the contract and * * * the agency was not required to accept a part which had not been pre-qualified" (Pet. App. Nies op. 3). Judge Cowen dissented on the ground that "under the terms of the contracts, [petitioner] had the right to submit equivalent insulation and did so when Okoflex was no longer available" (Pet. App. Cowen op. 2).

ARGUMENT

The court of appeals' decision affirming the ASBCA's termination of petitioner's contracts is correct and does not conflict with any decision of this Court or the decisions of

any other court of appeals. Accordingly, further review of this fact-specific case is not warranted.

1. The ASBCA correctly concluded that petitioner was obligated under its contracts to supply electrical bundles with Okoflex insulation and that the contracts were properly terminated because of petitioner's failure to do so.

The government contracted for electrical bundles that had been pre-qualified after being subjected to exacting and extensive testing (Pet. App. ASBCA op. 2-6). Petitioner was aware of the pre-qualification requirement, and, in fact, provided pre-qualified bundles under its contracts for ten years prior to 1985 (*id.* at 5-6). Petitioner also knew that it was obligated under the contract to obtain approval of a VECP before it could make a material alteration to the bundles (*id.* at 8-12). By filing a VECP, petitioner recognized that substitution of EPR insulation for Okoflex insulation was a material alteration (*id.* at 37). The data that petitioner submitted to support this alteration, however, were "grossly insufficient" (Pet. App. Nies op. 2; see also *id.* at ASBCA Op. 23-24). Under these circumstances, the ASBCA correctly concluded (Pet. App. ASBCA op. 36-39) that the government was under no obligation to undertake the extensive and costly additional testing required to qualify the modified bundles or to accept the non-conforming bundles.

The ASBCA was also correct in observing that any damages that petitioner may have sustained were self-inflicted. For one thing, petitioner – not the Air Force – had the burden of ensuring a sufficient supply of Okoflex to perform its contract duties. (Pet. App. ASBCA op. 38-39).[2] In addition, in deciding to manufacture bundles

[2] *E.g.*, *WRB Corp.* v. *United States*, 183 Ct. Cl. 409, 511-512 (1968). There is no evidence in the record that petitioner ascertained the availability of Okoflex before executing the contracts (Pet. App. ASBCA op. 37).

with EPR insulation while awaiting a decision on its VECP, petitioner assumed the risk that those goods would be determined to be non-conforming.

In arguing to the contrary, petitioner relies (Pet. 11-12, 29) on the fact that, by February 1985, the Air Force decided it had adequate electrical bundles to meet its future needs. That reliance is misplaced. There was no evidence in the record to suggest that the Air Force would have rejected petitioner's bundles had they been conforming or had the VECP been approved (Pet. App. Brown op. 19).

2. Likewise misplaced is petitioner's reliance on two decisions of the Federal Circuit holding that the government may not terminate a contract for default when the termination is based on the government's desire to deal no further with the contractor, *Darwin Construction Co.* v. *United States*, 811 F.2d 593 (Fed. Cir. 1987), and *Schlesinger* v. *United States*, 390 F.2d 702 (Ct. Cl. 1968). In both cases, the trier of fact found that the Air Force's decision to terminate the contracts for default was a pretext. *Darwin*, 811 F.2d at 596; *Schlesinger*, 390 F.2d at 708-709. No such finding was made in this case, and those decisions are therefore inapposite.

3. Petitioner renews its assertion (Pet. 40-45) that the ASBCA's decision was based upon a "course of dealing" argument that the government allegedly waived. The court of appeals rejected [redacted] petitioner's contention as lacking factual support in the record (Pet. App. Brown op. 13 n.4). In any event, the ASBCA properly allowed the Air Force to introduce testimony concerning the circumstances under which the contracts were executed. Evidence of the parties' prior and contemporaneous conduct is probative of their intent regarding the meaning of the contract terms. *Julius Goldman's Egg City* v. *United States*, 697 F.2d 1051, 1058 (Fed. Cir.), cert. denied, 464 U.S. 814 (1983); *Macke Co.* v. *United States*, 467 F.2d 1323, 1325 (Ct. Cl. 1972);

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International Telephone & Telegraph v. *United States*, 453 F.2d 1283, 1290 (Ct. Cl. 1972). In this case, the ASBCA found that past actions of the parties supported the conclusion that petitioner understood that (1) the electrical bundles had been pre-qualified, and (2) the Air Force expected to receive bundles that met the pre-qualification standard pursuant to the contracts. Petitioner provides no basis for setting aside that finding. See 41 U.S.C. 609(b) (fact-findings of ASBCA "shall be final and conclusive" unless "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if * * * not supported by substantial evidence").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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